

KEJURUTERAAN TAIPAN (M) SDN BHD

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v.

LOH & LOH CONSTRUCTION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

B

VT SINGHAM J

[CIVIL SUIT NO: S22-323-2001]

30 DECEMBER 2010

CIVIL PROCEDURE: *Action - Reinstatement of action - Plaintiff and solicitor absent during pre-trial case management - Writ and statement of claim struck out - Plaintiff's solicitor filed application for reinstatement 38 days later - Whether inordinate delay, inexcusable and unacceptable - Whether serious risk of prejudice to defendant if application allowed*

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This was an application by the plaintiff to reinstate the writ of summons and statement of claim which was struck out as the plaintiff and its solicitor was absent during the pre-trial case management. The plaintiff made this application 38 days from the date the writ and statement of claim was struck out. The reason advanced by the plaintiff's solicitor for not attending court on that day for the pre-trial case management was that he was ill and had arrived late in court. He produced a medical certificate to that effect. The defendant's solicitor submitted that the plaintiff's solicitor did not mention that he was ill when he was informed that the writ of summons was struck out due to his absence except that he would be delayed.

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Held (dismissing the plaintiff's application):

- (1) There was lack of candidness on the part of the plaintiff's solicitor as to his reason for not attending court. He could have come to court immediately on the same day with the defendant's solicitor upon learning that the writ and the statement of claim was struck out and request for the case to be recalled. Instead he decided to see a doctor and obtain a medical certificate. (para 6)
- (2) Generally, an application to reinstate a writ of summons which was struck out is normally granted but it is not as of right. From the background facts and the surrounding circumstances of the present case, there was no inclination to grant the plaintiff's application as the *bona fide* of producing the medical

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- A certificate for just one day was questionable and it did not state that the plaintiff's solicitor was unable to attend court on that day. There was a real risk of prejudice to the defendant if the application was allowed. (paras 8 & 9)
- B (3) The plaintiff's solicitor should have filed the application immediately upon being informed that the plaintiff's writ and statement of claim had been struck out if he was genuinely serious in proceeding with this case. The plaintiff's solicitor was not required to wait for the sealed order to be extracted and served on him, as there was no such requirement under the rules of the court. There was no reasonable explanation for the delay as the plaintiff's solicitor could have filed for reinstatement the next day. This application which was filed 38 days later was inordinate delay, inexcusable and not acceptable. (para 10)
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Case(s) referred to:

- Anwar Ibrahim v. Abdul Khalid & Anor* [2004] 8 CLJ 14 HC (**refd**)
Arab Malaysian Credit Berhad v. Tan Seang Meng [1995] 1 CLJ 773 CA (**refd**)
- E *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors, Chishty Coveney & Co v. Raja* (TLR 29 December 1997 at 698) (**refd**)
Cempaka Finance Bhd v. Fajar Lodge Sdn Bhd & Ors [2002] 2 CLJ 745 HC (**refd**)
Costellow v. Somerset County Council [1993] 1 All ER 952 (**refd**)
- F *Dato' Leong Pow Kue & Ors v. Gan Kim Seng; Pentadbir Tanah Daerah Johor Bharu & Ors (Third Parties)* [1999] 5 CLJ 426 HC (**refd**)
Gan Boon Kyee v. Yap Hong Sin & Anor [1997] 3 CLJ 822 CA (**refd**)
Gurdev Kaur Bhag Singh v. BSN Commercial Bank (M) Bhd [2003] 1 CLJ 429 CA (**refd**)
Hatara (M) Sdn Bhd v. Petroleum Nasional Bhd & Anor [2010] 3 CLJ 550 CA (**refd**)
- G *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 CA (**refd**)
Lepang Enterprise Sdn Bhd v. Goh Ah Lun [2001] 8 CLJ 392 HC (**refd**)
Malayan Banking Bhd v. Lim Tee Yong & 3 Ors [1994] 4 CLJ 558 HC (**refd**)
- H *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586 FC (**refd**)
Othman Puteh & Anor v. Ku Azman Ku Bahari [2002] 7 CLJ 64 HC (**refd**)
Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC (**refd**)
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Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad [1995] 1 CLJ 491 CA (*refd*) A
Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 CA (*refd*)

Legislation referred to:

Companies Act 1965, s. 236(1)(e) B
National Land Code 1965, s. 256(3)
Rules of the High Court 1980, O. 34 r. 1(1), O. 42, O. 83, O. 92

For the plaintiff - Mr Venu K Nair; M/s Paul Cheah & Assocs
For the defendant - Ms Celine Chelladurai (Ms Saritha Devi with her); C
M/s Zaid Ibrahim & Co

Reported by Melinda Robert

JUDGMENT D

VT Singham J:

[1] This is an application dated 10 December 2010 (encl. 54) by the plaintiff to reinstate the writ of summons and the statement of claim which was struck out by this court on 2 November 2010 when the case was called up for pre-trial case management (encl. 9). This application (encl. 54) was filed on 10 December 2010, that is about 38 days from the date this court had struck out the writ of summons and the statement of claim on 2 November 2010 as both the plaintiff and the plaintiff's solicitor was absent. This application is supported by an affidavit affirmed on 10 December 2010 (encl. 55) by Mr Venu a/l Kapinayar, the plaintiff's solicitor. The reason advanced by the plaintiff's solicitor for not attending court on 2 November 2010 for the pre-trial case management was, he was ill and had arrived late in court. In fact, the plaintiff's solicitor had stated that he was informed by the defendant's solicitor on the same day on 2 November 2010 that the writ of summons and the statement of claim was struck out as he was absent when the case was called for pre-trial case management. E F G H

[2] On going through the court's file, this court finds that the notice for pre-trial case management (encl. 9) pursuant to O. 34 r. 1(1) of the Rules of the High Court 1980 was filed on 31 July 2001, that is about 9½ years ago and yet the trial had I

- A not proceeded for several reasons as submitted by learned counsel for the plaintiff. In fact, the plaintiff's solicitors, Messrs Paul Cheah & Associates were appointed by the court in petition for winding-up in D4-28-510-1999 under s. 236(1)(e) of the Companies Act 1965 (encl. 13) on 10 July 2002 to assist the
B official receiver and the provisional liquidator in the present case. The plaintiff's company was wound up on 26 May 2000.

[3] Section 236(1)(e) of the Companies Act 1965 states:

- C The liquidator may with the authority either of the Court or of the committee of inspection:

(e) appoint an advocate to assist him in his duties.

- [4] The plaintiff's writ of summon and the statement of claim and the defendant's counterclaim had previously been struck out on 29 November 2004 by his Lordship, Mohd Hishamudin bin Mohd Yunus J (now JCA) as both parties did not attend court when the pre-trial case management was called up. However, by an application (encl. 29) and (encl. 31) respectively, both the
D plaintiff and defendant's solicitors had applied to reinstate their
E respective claim. One of the reasons advanced by the "afidavit sokongan" affirmed on 30 November 2004 (encl. 28) by the plaintiff's solicitor was that he had arrived late in court due to an unexpected traffic jam and he was absent when the pre-trial case management was called up before his Lordship Mohd Hishamudin bin Mohd Yunus J (now JCA). In any event, by the order of court
F (encl. 36), both the plaintiff's writ of summons and the defendant's counterclaim was reinstated on 24 January 2005.

- [5] As to the copy of the medical certificate which has been exhibited and marked as VKPN1 in the "afidavit sokongan" affirmed by the plaintiff's solicitor (encl. 55), the plaintiff's solicitor has admitted that he was able to come to court on 2 November 2010 and that he was on his way to court when he was informed that the writ of summons and the statement of claim was struck out. However, when the plaintiff's solicitor was informed by the
H defendant's solicitor that the plaintiff's writ of summons was struck out, it would appear that he then went to see a doctor and obtained the said medical certificate to justify his absence in court. Regrettably, when this court considered the "afidavit jawapan ke-
I 2 defendan" affirmed by the defendant's solicitor (encl. 62)

particularly, para. 5(a) of the said “afidavit jawapan”, it is clear that the plaintiff’s solicitor did not inform the defendant’s solicitor that he was ill at the time when he was informed that the plaintiff’s writ of summons was struck out due to his absence except that he will be delayed.

[6] Accordingly, this court is in agreement with the defendant’s solicitor’s reply in para. 4(c) of the “afidavit jawapan defendan” (encl. 58) and find that the production of the copy of the medical certificate was an afterthought. Admittedly, the plaintiff’s solicitor did not see a doctor before coming to court. In fact, he could have requested the defendant’s solicitor to mention on his behalf if he was genuinely ill and could have gone to see the doctor and produce the medical certificate to the court on a later date. Instead, and according to him, he decided to come to court although he claimed that he was ill.

[7] On the totality of the facts and upon considering the affidavits of both parties, it would appear, and with respect that there is lack of candidness on the part of the plaintiff’s solicitor as to his reason for not attending court on 2 November 2010 when the pre-trial case management proceeding was called up. In any event, he could have still come to court with the defendant’s solicitor immediately on the same day and upon being informed that the plaintiff’s writ of summon and the statement of claim was struck out and approached the court if the case could be recalled. Regrettably, and admittedly the plaintiff’s solicitor did not invite the defendant’s solicitor or come to court immediately on the same day but instead he went to see a doctor to obtain the medical certificate after being informed that the plaintiff’s writ of summons and statement of claim was struck out.

[8] It is trite law that the burden is upon an applicant who seeks the indulgence of the court to make available sufficient materials upon which this court may exercise its discretion in his favour. In the present case, there is insufficient materials placed before this court warranting the exercise of its discretion in the plaintiff’s favour. The reasons advanced by the plaintiff in his affidavit for not attending court are wholly inadequate, inexcusable and doubtful. The materials produced before this court did not justify the exercise of the court’s discretion to grant the plaintiff’s application.

- A [9] This court finds, with respect, there is no full disclosure of the actual reason and there is lack of candidness for the absence of the plaintiff's solicitor. Generally, an application to reinstate a writ of summons which was struck out is normally granted but not as of right. Each case is based on its own set of facts.
- B Nevertheless, this court is mindful that this court has the discretion to allow the plaintiff's application for reinstatement of the writ of summons and order the plaintiff to pay costs to the defendant. However, on the background facts and the surrounding circumstances in the present case, this court is not inclined to
- C grant its indulgence to the plaintiff as the *bona fide* of producing the medical certificate for just one day is questionable and it does not state the plaintiff's solicitor was unable to attend court on 2 November 2010. Therefore, on this ground itself, the plaintiff's application to reinstate the writ of summons ought to be
- D dismissed. (See *Cempaka Finance Bhd v. Fajar Lodge Sdn Bhd & Ors* [2002] 2 CLJ 745).

- E [10] In the event, if this court had erred in his findings on the reason advanced by the plaintiff's solicitor for his absence in court on 2 November 2010, this court finds there is no reasonable explanation for the delay in filing this application to reinstate which was filed only on 10 December 2010, that is about 38 days from the date the writ of summons and the statement of claim was struck out on 2 November 2010. The reason advanced by the
- F plaintiff's solicitor in para. 7(d) of the affidavit jawapan on behalf of the plaintiff (encl. 59) is flimsy and not reasonable. If the plaintiff was genuinely serious in proceeding with this case, this application ought to have been filed immediately upon being informed that the plaintiff's writ of summons and the statement of
- G claim was struck out. The plaintiff's solicitor need not have to wait for the sealed order to be extracted and served on him and as conceded by the plaintiff's solicitor there is no such requirement under the rules of the court. This application which was filed 38 days later is inordinate delay, inexcusable and not acceptable
- H when considering the background facts and the surrounding circumstances in the present case. "It is axiomatic that the law assists the vigilant and not the indolent" (see *Gan Boon Kyee v. Yap Hong Sin & Anor* [1997] 3 CLJ 822 at p. 826). (See also *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ
- I 449).

[11] In *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 Gopal Sri Ram JCA (as he then was) at p. 401 said: A

It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non-dormientibus, jura subveniunt*. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant. B

In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a manner which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion. C

[12] In *Gurdev Kaur Bhag Singh v. BSN Commercial Bank (M) Bhd* [2003] 1 CLJ 429 His Lordship Richard Malanjum JCA (as he then was) at p. 433 said: D

In any event we did consider the grounds advanced in support of the two applications and we found no merit in them. In the first motion the explanation given for the delay in filing the proper notice of appeal against the order for sale is squarely put to the former solicitor of the applicant in that it was alleged that he did not do his work and did not keep the applicant informed of the status of the case. That is not a good reason for us to exercise our discretion and grant leave. The applicant can always seek remedy elsewhere if she has any grievance against her former solicitor. It is settled law that mistake of one's solicitor is not necessarily a good excuse. (See *Sinnathamby & Anor v. Lee Chooi Ying, Brijkishore & Anor v. Lee Chooi Ying* [1987] 1 MLJ 110; [1987] 1 CLJ 157; [1987] CLJ (Rep) 336). E

[13] In *Malayan Banking Bhd v. Lim Tee Yong & 3 Ors* [1994] 4 CLJ 558, His Lordship, Mohd Hishamudin bin Mohd Yunus J (now JCA) said at p. 561: F

At the same time, however, I am also of the view that litigants should not treat rules of procedure lightly. Nor should they take the court for granted. Any litigant who neglects to adhere strictly to the rules of procedure does so at his own peril. G

[14] On prejudice to the due administration of justice the view of Lord Woolf, Master of the Rolls in *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors, Chishty Coveney & Co v. Raja* (TLR I

- A 29 December 1997 at 698), was considered by Vincent Ng J (as he then was) in *Othman Puteh & Anor v. Ku Azman Ku Bahari* [2002] 7 CLJ 64 at p. 67 where Lord Woolf said:

B ... Litigants and their advisers had therefore to recognise that in the future any delay which occurred would be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it was, but also in relation to other litigants and the prejudice which was caused to the due administration of justice. The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed. The nature of the infringement and the extent of culpability of the solicitors who breached the rules would determine whether prejudice to the due administration of justice had occurred. Surely, a short period of delay in filing a document or a defect in form would not cause any prejudice to the due administration of justice and such objections would clearly be frivolous and be deemed intended to stall the proceedings. But, if the infringement is significant and the culpability is of a high degree, the court cannot overlook such conduct without also condoning it and thereby encouraging non-observance and total disregard of clearly expressed rules in general which are meant to be observed. I find strong support for this view in *Ratnam v. Cumarasamy* [1964] 1 MLJ 228. (emphasis added).

[15] In *Costellow v. Somerset County Council* [1993] 1 All ER 952 Sir Thomas Bingham MR said at p. 959:

- F **The first principle** is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. **The**
- G **second principle** is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings. Neither of these principles is absolute. *But the court's practice has been to treat the existence of such prejudice a crucial, and often a decisive matter. If the second principle were followed without exception, a well to do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred.* (emphasis added).
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[16] It is also important to state at this stage that in the present case, the plaintiff's statement of claim was filed on 21 May 2001, the statement of defence and counterclaim was filed on 12 June 2001, the reply to the statement of defence and counterclaim was filed on 18 July 2001. Delay in filing an application like this in some case may be caused by unforeseen circumstances like sudden death or inevitable accident or sudden serious illness or something of that kind which reasonably account for the delay. Accordingly, under any of those circumstances, perhaps, the application to reinstate may be allowed. Nevertheless, in the present case and upon considering the totality of the facts and the surrounding circumstances, there is some doubt as to the *bona fide* or the genuineness for the production of the medical certificate to show the plaintiff's solicitor was ill on 2 November 2010 and was unable to attend court on that date where the plaintiff's solicitor had gone to see a doctor after he was informed that the writ of summons and the statement of claim was struck out. The medical certificate exh. VKPN1 did not state the plaintiff's solicitor was unable to attend court on 2 November 2010. This court also finds that there is a real risk of prejudice to the defendant if this application is allowed when considering the delay and the background facts in the present case.

[17] In support of the application, learned counsel for the plaintiff had referred to the following cases:

- (i) *Hatara (M) Sdn Bhd v. Petroliam Nasional Bhd & Anor* [2010] 3 CLJ 550
- (ii) Rules of the High Court 1980, O. 34, 42 & 92
- (iii) *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586
- (iv) *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319
- (v) *Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491
- (vi) *Arab Malaysian Credit Berhad v. Tan Seang Meng* [1995] 1 CLJ 773

- A [18] In objecting the application, learned counsel for the defendant had referred to the following cases:
- (i) *Cempaka Finance Bhd v. Fajar Lodge Sdn Bhd & Ors* [2002] 2 CLJ 745
- B (ii) *Dato' Leong Pow Kue & Ors v. Gan Kim Seng; Pentadbir Tanah Daerah Johor Bharu & Ors (Third Parties)* [1999] 5 CLJ 426
- (iii) *Gan Boon Kyee v. Yap Hong Sin & Anor* [1997] 3 CLJ 822
- C (iv) *Anwar Ibrahim v. Abdul Khalid & Anor* [2004] 8 CLJ 14
- (v) *Lepang Enterprise Sdn Bhd v. Goh Ah Lun* [2001] 8 CLJ 392
- (vi) *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ 449
- D [19] The facts in *Hatara (M) Sdn Bhd v. Petroliam Nasional Bhd & Anor* [2010] 3 CLJ 550 relied on by the plaintiff's solicitor can be distinguished. In that case, the Court of Appeal had observed that the learned judge of the High Court did not hear any
- E explanation from the plaintiff's solicitor for the alleged non-compliance of the peremptory order. Therefore, the Court of Appeal, amongst other reasons had allowed the plaintiff's appeal against the refusal of the learned judge of the High Court to reinstate the writ of summons which was struck out due to the
- F plaintiff's failure to comply with the directions under the case management.
- [20] In *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586 there was non-
- G compliance of the requirements of O. 83 r. 2(4) of the Rules of the High Court 1980 where the chargor was not notified of the adjourned hearing of the application for order of sale made pursuant to s. 256(3) of the National Land Code 1965. The order of sale was made in the absence of the chargor and in breach of
- H the rules of natural justice. Therefore, the facts and surrounding circumstances in that case are distinguishable and poles apart when compared to the facts and the surrounding circumstances in the present case. The three other cases, namely, *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ
- I (Rep) 319, *Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491 CA, *Arab*

Malaysian Credit Berhad v. Tan Seang Meng [1995] 1 CLJ 773, are not directly relevant to the facts, issues and the surrounding circumstances in the present case and does not assist the plaintiff in support of his application.

[21] In the circumstances and having considered the plaintiff's application, the affidavits of both parties, both the written and oral submissions with the authorities and the research carried out by this court and for the reasons advanced above, this court is of the considered view that this court ought not to exercise its discretion in favour of the plaintiff. On the background facts and the surrounding circumstances, the balance of justice favours the defendant.

[22] Accordingly, and in accordance with the rules of reason and justice, the plaintiff's application (encl. 54) is dismissed.

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